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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-621

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FEDERAL MUTUAL INSURANCE COMPANY and LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioners,

—against—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Where the District Court and the Court of Appeals found no factual basis for the assertion of a tie-in or for

any other violation of the antitrust laws and the petitioners cannot show that such findings were erroneous as a matter of law does the petition come within any consideration referred to in Rule 19 of the rules of this Court?

Statement of the Case

Erroneous assumptions of fact in the "Question Presented" by the petitioners (collectively hereafter referred to as "Kemper"), as well as distortions and omissions of pertinent facts in the petitioners' Statement of the Case, compel a further statement by the respondent (ABC).

The fragmented Statement of the Case as presented by Kemper does not reveal the extended negotiations between the parties and the facts and circumstances which led to the signing of the subject contract. The opinions of the District Court (B. 1) and the Circuit Court (A. 1, C. 1) as well as the opinion of the District Court granting summary judgment (*American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619 (1967)) painstakingly discuss all the relevant facts and repetition thereof would serve no useful purpose.

Accordingly, to place this case in proper focus, only a brief factual statement is necessary.

In January, 1962 when Kemper was shopping for television advertising, it was given an initial package price of $22,000 per telecast for sponsorship of the news program entitled, "Evening Report", over ABC's then "going lineup" (consisting of approximately 99 stations at the time the offer was made) which was based on a special 47½ per cent discount from ABC's published rate card time charges for the stations comprising the lineup. There-

after, on May 4, 1962 Kemper offered to sponsor the program over its own tailored lineup of 95 stations, only 67 of which were carrying the program at a price of $24,250 which Kemper computed by applying the 47½ per cent package price discount. What it did was to eliminate 32 of the stations on the then going lineup and substitute 28 stations which were more valuable and expensive than the 32 stations eliminated.

After the extensive negotiations and correspondence between the parties a written contract dated August 15, 1962 was signed pursuant to which Kemper agreed to sponsor one program per week over a 26-week period beginning October 17, 1962. The lineup referred to in the contract was neither the original one offered by ABC nor the one appearing in the May 4, 1962 order letter, but rather a compromise lineup which emerged from the negotiations.

Under Kemper's sponsorship the program Evening Report was broadcast on October 17, 26, 31 and on November 9, 1962 (270 F. Supp. 619, 636), after which Kemper deliberately and unlawfully breached the agreement.

Three telecasts wherein Kemper appeared as the sponsor occurred before September 9, 1962. Kemper paid for such telecasts without objection and certainly without any suggestion that the contract was in violation of any antitrust law. In fact, as late as two months after the cancellation of the contract Kemper never complained of any illegal tie-in sale and the first time the claim was asserted was in the answer Kemper interposed in the New York State Supreme Court action which was brought for non-payment of the November 9, 1962 telecast and for damages for anticipatory breach of contract as to the bal-

ance of the contract term.* The charge by ABC that Kemper's belated assertion of an antitrust violation was concocted was only casually noted by the Court of Appeals when it said, "In light of the history of the Kemper-ABC agreement one may suspect that the claim of Sherman Act illegality was an afterthought to justify having broken a contract that had turned sour" but otherwise was almost totally ignored from a realistic point (A. 12) although perhaps technically correct. The fact remains that Kemper was able to reach back into the history of the negotiations and pick out one item upon which it predicated the charge that the antitrust laws were violated in that Kemper at one period during the lengthy negotiations said it did not want 32 stations in the "going lineup". Whether the latter was a matter of serious concern to Kemper or mentioned only in the early stages and dropped because of the other beneficial results Kemper obtained in the give and take of the bargaining, or whether it was only a negotiating ploy to obtain a better contract, in the final analysis were questions of fact which have been found adversely to Kemper's contentions.

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* In Kemper's petition the footnote on page 5 refers to the application before this Court for a writ of certiorari to the New York State Court of Appeals in *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.* 385 U. S. 931 (1966), which finally terminated the State Court action. Kemper then says: "Thus this is not a case where a promisor is attempting avoiding paying an agreed price for a consideration the promisor had actually received" but the latter statement must be placed in its proper context. Kemper's resistance is obvious from a mere listing of the various steps taken in the litigation itself. Moreover, this action was filed at the same time as the State Court action. While it may be interesting to speculate about the impact of *Kelly* v. *Kosuga*, 385 U. S. 516 (1959), upon this back door approach, we need not consider the problem in view of the findings of fact herein.

ARGUMENT

The findings of fact made by the District Court and affirmed by the Court of Appeals remove from this case any precedential significance.

The decision of the Court of Appeals which affirmed the factual findings of the District Court is (a) certainly not in conflict with the decision of any other Court of Appeals, (b) not one which has decided an important federal question, and (c) not one which has so far departed from the usual course of judicial proceedings, or so far sanctioned such a departure by a lower court. On the contrary, the "nearly 200 pages" of opinions which "recount every factual detail" (C. 2) indicate the careful study made of the facts by the District Court and the Court of Appeals and the indulgent opportunities afforded Kemper to sustain the after-the-fact concocted charge of an antitrust violation.

Kemper now seeks to avoid the effect of the adverse findings of fact by a number of transparent distortive contentions.

Kemper postulates its petition on the claim that there were "repeated demands throughout a month" that ABC eliminate from the ABC station lineup 32 of the 99 ABC affiliated stations carrying Evening Report (pp. 3 and 4 of petition). The negotiations in fact lasted over a period of six months beginning with January 25, 1962 (B. 4) and ending with the signing of the contract dated August 15, 1962 (B. 44). The District Court and the Circuit Court considered the demands in the context of the overall negotiations and did not confine their consideration of the facts to a period "throughout a month".

Kemper also asserts that "ABC conditioned the sale of Evening Report to Kemper over the desired stations

on Kemper's purchase of Evening Report over the 32 unwanted stations" (p. 4 of petition). The fact is that ABC had a news program already on the air over an existing lineup of stations with other sponsors and it offered Kemper the "going lineup" at a package rate. Kemper then submitted a counter-offer in a letter dated May 4, 1962 which the District Court found was "a radical departure from ABC's offer" (B. 53).

On page 14 of the petition Kemper says: "This Court has made clear that what constitutes a combination within the meaning of the Sherman Act is so much a matter of law, rather than fact, that the Court will reverse not only a District Court, but also a jury finding as to the existence of a combination once certain facts are shown". Assuming the latter statement is correct, petitioners have failed to bring themselves to the "once the facts are shown" point.

Kemper then asserts on page 15: "The decisions below would valuate tie-ins unless there is a showing that the buyer persevered to some undefined degree in demanding selectivity, even after the seller refused to break the package into component parts." In the first place the statement assumes that there was a tie-in. Secondly, the statement assumes that the buyer persevered to any degree in demanding selectivity and, thirdly, it assumes that the seller refused to break the package into its component parts. On all these matters the District Court and the Circuit Court found petitioners' case factually insufficient.

Kemper, on page 15, says: "Here the Circuit and District Courts focused on such subjective factors as Kemper's motives, the degree of Kemper's desire not to buy the unwanted stations, Kemper's 'real objectives,' its dili-

gence in persevering and the reasonableness of its failure to persevere after May 23, 1962." Neither Court "focused on such subjective factors" but rather considered the totality of all the evidence, oral and written, direct and circumstantial, expressed and inferred, and subjective and objective.

Based upon the entire record which both Courts had before them it was clear to them as it is to anyone reviewing the evidence that Kemper's claim, that it only wanted 67 stations in the "going lineup" which it accepted only because its "perserverance" had failed, is contradicted and rendered incredible in light of the following salient facts:

(a) The negotiations lasted over a period of about six months (B. 4, 44);

(b) In January, 1962 Kemper was offered, at a package rate, the sponsorship of a news program which was already on the air five days per week with other sponsors for certain days over a "going lineup" of stations (B. 5);

(c) On May 4, 1962, Kemper submitted a counter-offer of an "ordered station lineup" which was a radical departure from ABC's offer (B. 53) and which was prepared for bargaining purposes by Kemper's employee, De Mark, "from the top of his head", but it was not a major concern; price was the important factor (B. 8, 9, 10, 11, 13, 14, 20, 42, 50, 58 and 67);

(d) Kemper never made an offer for the 67 stations it now claims it wanted (B. 74);

(e) Kemper during the entire period was represented by an advertising agency, had an employee who was its own advertising manager and "the individuals

engaged in the negotiations were not novices—rather, they were experienced in negotiations of this type." (B. 76);

(f) In the negotiations Kemper had the dominant bargaining position for the following reasons:

(1) ABC was "distinctly third" among the three networks in the area of news (B. 65);

(2) The program was difficult to sell and in fact was a "Turkey" (i.e., unsuccessful) (B. 65);

(3) ABC was having trouble selling the program as late as July of 1962 and the closer to air time the more advantageous it was to get a good deal, particularly when Kemper knew ABC had not sold all the availabilities (B. 65); and, in fact, the sponsorship contract was not signed until August 14, 1962, or about one month before air time;

(g) After Kemper had obtained various concessions from ABC the so-called "unwanted stations" were not mentioned (B. 10, 11, 14, 16, 29, 31, 37, 44) and "the primary emphasis was on additional markets" (B. 50, 52);

(h) Even after the sponsorship contract was signed, if Kemper had in fact been coerced, it could have repudiated the contract.

Kemper, aside from squirming to avoid the effect of the findings of fact, also shifts its position as is readily apparent from the argument made on page 17 of the petition that "the decision below is squarely contrary to the many decisions of this Court that have found that economic pressure is not necessary to proof of an illegal tie-in". This desperate attempt to reach for an issue is al-

most duplicitous. Kemper itself vehemently urged in Point I of its brief filed with the Court of Appeals that economic coercion was exercised over it in procuring the contract and devoted seven printed pages to a discussion of that very contention which it summed up in its own words as follows: "Whether Kemper should have negotiated further turns on whether ABC's response to Kemper's demand to eliminate 32 of the 99 stations from the 'Evening Report' lineup was coercive". Kemper also argued before the Court of Appeals that the District Court erred in that "It approached the coercion issue as if it were dealing with that kind of coercion that would void a contract at common law" (page 18 of Kemper's brief to the Court of Appeals dated April 7, 1971). Kemper spoke of coercion in "the antitrust tie-in sense" and as "economic coercion". When the District Court found and the Circuit Court answered Kemper's argument by stating that there was no coercion in any sense, Kemper now changes its tune and argues before this Court that economic pressure is not a necessary element in a tie-in.

Kemper goes on and simply concludes that there was an illegal tie-in which should have been ruled as a per se violation. It then relies upon inapplicable and inapposite cases decided by this Court based upon totally different factual situations. In *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1 (1958), this Court noted that "the essential prerequisites for treating the defendant's tying arrangements as unreasonable per se were conclusively established below" (p. 8). In the present case the District Court and the Court of Appeals not only found no "essential prerequisites" but actually found no factual basis whatever for concluding, as Kemper does, that there was a tie-in.

In *International Salt Co., Inc.* v. *United States,* 332 U. S. 392 (1947), it was similarly held that there existed

the "essential prerequisites" for concluding that the contracts in question which required lessees of patented machinery to purchase salt from the lessor despite certain ameliorating clauses did "not avoid the stifling effect of the agreement on competition" and also gave the lessor "a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market" (p. 397). It thus becomes almost wearisome to repeat that no such contractual or factual considerations were found by the courts below to have existed in the present case. Both of the aforesaid cases were government antitrust prosecutions where per se violations were involved.

The Court of Appeals in its opinion discussed *United States* v. *Loew's Incorporated,* 371 U. S. 38 (1962) and *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U. S. 495 (1969) and held both distinguishable on the facts. Moreover in *Fortner* this Court merely held that sufficient evidence was present to require a trial. The negotiations conducted by the parties in the instant case were on a different footing and the Court of Appeals commented as to the offers and counter offers made during the negotiations that "bartering ploys are not generally the concern of antitrust laws" (C. 12).

Taking quotations from other cases decided by this Court as Kemper does throughout its petition serves no useful purpose because they must be viewed in the context of each opinion.

The fact remains that Kemper never reached the first plateau of establishing the "essential prerequisites" to sustain a tie-in charge. It failed to show that Kemper was subject to tie-in conditions of any kind, legal or illegal, reasonable or unreasonable, and it failed to show factually that it was subject to coercion of any type. The